In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 219.

In the Matter of
THE ALLIED PRODUCTS COMPANY,
Bankrupt.

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

HAROLD H. BARNETT, TRUSTEE,
Respondent.

BRIEF OF RESPONDENT HAROLD H. BARNETT, TRUSTEE, OPPOSING PETITION FOR CERTIORARI.

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PRELIMINARY STATEMENT.

The Petition for Certiorari, and the supporting brief, disclose that Petitioner Continental Casualty Company (hereinafter sometimes called "Continental") desires a review by this Court of the decision of the Circuit Court of Appeals for two principal reasons which Continental has stated in several different ways. Petitioner's two reasons are:

1. The Circuit Court of Appeals, the District Court and the Referee all found as a fact that there was no default on the part of Bankrupt. They had no right to make such a finding since the Agreed Statement

of Facts upon which the matter was tried did not justify any such finding.[1]

2. Default is a matter of law, and under the stipulated facts there was a default as a matter of law.[2]

Respondent contends that there is ample support in the record for the findings and decision of the Referee approved by both courts below, and that there is no valid ground for the issuance of a writ of certiorari.

STATEMENT OF FACTS.

Continental's Statement of Facts[3] requires some correction and amplification to present the issues made in their proper perspective. Respondent is the Trustee in Bankruptcy of The Allied Products Company, Bankrupt. Respondent's Bankrupt was a road contractor which entered into three paving contracts with the State of West Virginia. Petitioner is a surety company which as surety executed Bankrupt's performance bonds upon all three paving projects.

The first contract (Nicholas County) was entered into in 1937, and was completed in December, 1938 without default or loss to surety, and $2,466 remained due Bankrupt at the date of bankruptcy. The second contract (Jackson County) was completed without loss in November, 1938, and $3,746 remained due Bankrupt at the date of bankruptcy.

The third contract (McDowell County) was entered into in February, 1939 (R. 5), and was completed in November, 1939.

Bankruptcy occurred on February 15, 1940, when Bankrupt filed a petition for reorganization under Chapter X

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[1] "Questions presented" Nos. (1), (2), (3) and (4); petition pp. 3, 4.

[2] "Questions presented" Nos. (4), (5) and (6); petition pp. 4, 5.

[3] Petition pp. 1, 2. The petition and the supporting brief being bound together with consecutive paging will hereinafter be cited as "Petition" with appropriate page numbers.

of the Bankruptcy Act. Reorganization having failed, liquidation was ordered in the Bankruptcy Court.

At the date of bankruptcy the State of West Virginia owed Bankrupt $9,875 on account of the McDowell project, and there were unpaid bills for material aggregating approximately $13,884 on account thereof. By order of the Bankruptcy Court this sum was paid to Continental on December 5, 1940 (Finding 13, R. 29, Agreed Statement of Facts (10), R. 24). Continental then paid these outstanding bills on the McDowell County project and sustained a net loss of about $4,000.

Continental claims the balances due on the Nicholas and Jackson County projects, upon which Continental sustained no losses, to apply against the loss sustained by it on the subsequent McDowell County project.

Continental's claim is based upon two separate Indemnity Agreements identical in form (R. 6), executed by Bankrupt in connection with the Nicholas and Jackson County Projects on printed forms prepared by Continental. The pertinent parts of each Indemnity Agreement[4] pro-

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[4] The pertinent portions of the Indemnity Agreements are as follows (R. 7):

"Fourth, to assign, transfer and set over, and does or do hereby assign, transfer and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; * * * (3) of a default in discharging such other indebtedness or liabilities when due; * * * (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; * * * (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; * * *."

vide, (a) for an assignment by Bankrupt to Continental of certain rights, hereinafter defined, as collateral to secure (1) any obligations of Bankrupt to Continental growing out of the immediate contract, and (2) any other indebtedness or liability of Bankrupt to Continental thereafter incurred; (b) that the assignment was to become effective on default by Bankrupt in discharging such future indebtedness or liability *when due*; (c) that the assignment conveyed only such moneys as should be retained or due Bankrupt at the time of default.

The Referee found as a fact (R. 31):

> "No default occurred prior to bankruptcy and Surety's [Continental's] power to collect never arose, but if default did occur Surety never exercised its power prior to bankruptcy."

The Referee carried this finding into his conclusions of law Nos. 5 and 6 (R. 32).

In his certificate the Referee stated (R. 40):

> "In the case at bar there is no evidence whatever of any default by bankrupt prior to bankruptcy, so that even as between the parties, bankrupt had not only the power but the right to collect the proceeds of the contracts, up to the date of bankruptcy. * * *."

Continental is therefore clearly mistaken when it states (Pet. 2):

> "The Referee found as a fact that there was no default by Bankrupt in failing to pay for material when due, and held against Continental."[5]

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[5] Continental is also clearly mistaken when it states (Pet. 7) "The Referee found as a fact there was no default and held against the Petitioner surety," and again when it states (Pet. 8): "Bankrupt failed to pay bills for materials *which were due before bankruptcy.*" (Italics supplied.) There is no evidence in the record, and it was not stipulated, that the unpaid bills were due before bankruptcy. As the Circuit Court of Appeals states in its opinion (R. 67), "A contrary finding below [that there was a default before bankruptcy] would have been clearly erroneous."

The Referee's finding and conclusion were expressly confirmed by the District Court (R. 46), and by the Circuit Court of Appeals (R. 66).

DISCUSSION.

Continental throughout this litigation has conceded that under the terms of the respective assignments of the Nicholas and Jackson balances, Bankrupt had the right from time to time to collect and use all moneys becoming due and payable until default under the subsequent McDowell County contract. It was therefore necessary for Continental on its own theory of this case to prove that default occurred in the McDowell contract prior to bankruptcy.

I.

BOTH COURTS BELOW CONCURRED WITH THE REFEREE IN FINDING THAT NO DEFAULT OCCURRED PRIOR TO BANKRUPTCY.

Both Courts below concurred with the Referee in finding that there was no default by Bankrupt, prior to bankruptcy, and that Continental's failure to prove default prior to bankruptcy was fatal to its case.

The District Judge in his opinion stated (R. 46):

> "The factual situation presented here is very similar to that involved in Maryland Casualty Company's petition for review. There is, however, a distinguishing factor here which, as I see it, bars completely the surety's [Continental's] right to prevail over the trustee, and that is the failure of the surety to establish that a default occurred prior to bankruptcy.
>
> "It was determined in the Maryland case that assignments such as are involved here become effective only after default. Therefore, in order for the surety to claim priority over the trustee, it was essential that it show a default prior to bankruptcy, at which time the trustee's lien attached.

"No such showing having been made, the Referee's finding that there was no default is determinative of the case."

Continental filed a motion for rehearing in the District Court, which was overruled (R. 47).

In its appeal to the Circuit Court of Appeals, Continental claimed that as a matter of law default had occurred prior to bankruptcy.[6] The Circuit Court of Appeals stated in its opinion (R. 67) that it would not set aside concurrent findings of fact of the Referee and the District Judge, and

"* * * There has been no showing in this case that the Referee and the District Court were plainly mistaken in their concurring finding of the decisive fact. **Upon the evidence in the case a contrary finding below would have been clearly erroneous.**" (Emphasis supplied.)

Continental filed in the Circuit Court of Appeals a petition for rehearing upon the precise point of default prior to bankruptcy,[7] which petition for rehearing was denied (R. 79).

Under the familiar rule of this Court, factual findings concurred in by two courts will not be disturbed unless clear error is shown.[8]

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[6] "Designation of Points Relied on on Appeal" Nos. 4, 5 and 6 (R. 49).

[7] R. 69, 70, Pars. 4, 5 and 6. Also see Continental's "Amplifying Memorandum" filed with the petition for rehearing (R. 73).

[8] *Just v. Chambers* (1941) 312 U. S. 383, 85 L. ed. 903;

Williams Manufacturing Co. v. United Shoe Machinery Corp. (1942) 316 U. S. 364, 86 L. ed. 1537;

Alabama Power Company v. Ickes (1938) 302 U. S. 464, 467, 82 L. ed. 374, 377;

United States v. O'Donnell (1938) 303 U. S. 501, 508, 82 L. ed. 980, 984;

Pick Manufacturing Co. v. General Motors (1936) 299 U. S. 3, 81 L. ed. 4.

II.

THE REFEREE AND THE COURTS BELOW PROPERLY FOUND THERE WAS NO DEFAULT PRIOR TO BANKRUPTCY.

A. Continental complains (Pet. 12) that the Referee had no right to make a finding of fact since the case was submitted upon an agreed statement.

Rule 52(a) of the Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *."

General Order in Bankruptcy No. 37 provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. * * *."

General Order No. 47 provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. * * *."

Under Section 39a (8) of the Bankruptcy Act it is the duty of the Referee to:

> "Prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the finding and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits;"

In view of these explicit provisions it was the plain duty of the Referee and of the District Court to make specific findings of fact, whether the findings were based upon conflicting testimony or based upon a stipulation between the parties.

This Court in the recent case of *Kelley v. Everglades Drainage District* (June 1, 1943), 87 L. ed. Adv. Ops. 1091 held that it was the duty of the trial court under Rule 52(a) of the Rules of Civil Procedure and General Order No. 37 to find the facts specially and remanded the case because of the failure of the trial court to make adequate findings.

B. There is absolutely nothing in the record to show that the concurrent findings of the two courts below and the Referee are not in strict accord with the stipulated facts. At the date of bankruptcy the State of West Virginia owed Bankrupt a balance of $9,875.58 on the McDowell County project[9] and material bills in the amount of $13,884.66 were unpaid. But it nowhere appears that these bills became due and payable prior to bankruptcy. In fact, Continental stipulated (R. 25) and the Referee found (R. 30) that Continental paid no bills, received no notice of any bills, asserted no claim to the unpaid balances due on the Nicholas and Jackson County projects, and gave no notice of any claim to said balances either to bankrupt, the officials of West Virginia, or anyone else, until after bankruptcy. As the Circuit Court of Appeals says in its opinion (R. 67) a finding of default prior to bankruptcy "would have been clearly erroneous."

III.

THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Continental urges (Pet. pp. 4, 10 and 15) that the decision below is "in conflict with the rule of law laid down by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Employers Casualty Company v. Rockwell County*, 35 S. W. (2) 690, 692 (Texas 1931)." The

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[9] (R. 24) This amount was paid to Continental December 5, 1940, nearly ten months after bankruptcy.

case cited was not decided by the United States Circuit Court of Appeals for the Fifth Circuit. It was decided by the Supreme Court of Texas. Further, the facts of the Texas case are clearly distinguishable: Only one contract was involved; the contractor abandoned the uncompleted contract to the surety which completed it; it was shown without dispute (35 S. W. 692) that bills for labor and material were unpaid "in violation of the terms thereof"; and the contractor informed the surety of its inability to proceed. The court held there was a default which entitled the surety to the unpaid balance both under the terms of the indemnity agreement and by subrogation.

The case of *Nelson v. Montgomery Ward Co.*, 312 U. S. 373, cited by Continental, is not in point. Of course the effect of admitted facts is a question of law. In the case at bar the fact of default prior to bankruptcy was not admitted.

IV.

CONTINENTAL, IN ITS PETITION FOR A WRIT OF CERTIORARI, HAS NOT BROUGHT FORWARD THE QUESTION OF THE VALIDITY OF THE ASSIGNMENTS AS AGAINST THE RESPONDENT, EVEN IF DEFAULT OCCURRED PRIOR TO BANKRUPTCY AND THEREFORE COULD NOT SECURE AFFIRMATIVE RELIEF EVEN IF THE PETITION WERE GRANTED.

Under the Rules of this Court, it is provided:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." Rule 38, Paragraph 2.

Helis v. Ward (1939) 308 U. S. 365, 370; 84 L. ed. 327, 329;

National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 357; 84 L. ed. 799, 807;

Dickinson Industrial Site v. Cowan (1940) 309 U. S. 382, 389; 84 L. ed. 819, 825.

Continental has not brought forward in its petition for a writ of certiorari the basic question involved in this case. The basic question is whether the purported assignments by Bankrupt of the Nicholas and Jackson County balances are valid as against the assignor's trustee in bankruptcy to reimburse Continental for the loss it sustained in connection with the McDowell County project. This question is not raised or discussed by Continental either in its petition for a writ of certiorari or the supporting brief.

Respondent contends and the Referee held[10] that since default did not occur prior to bankruptcy, Continental's power to collect never arose, but even if it did then both under the rule of this Court in *Benedict v. Ratner* (1935) 268 U. S. 351 and under the applicable state decisions the assignments are void as against the Trustee irrespective of the time when default occurred because of the unfettered dominion over the funds in dispute which Continental agreed Bankrupt should have.

Even if the petition for a Writ of Certiorari were granted, Continental has not brought before this Court the questions necessary for the relief it claims.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[10] Conclusions 5 and 6, R. 32, Certificate R. 40.